Supreme Court, U.S.
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No. 04-1137

In The

Supreme Court of the United States

NEW YORK CITY TRANSIT AUTHORITY,

Cross-Petitioner,

v.

JESSICA RODRIGUEZ-FREYTAS,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

The New York City Transit Authority, the Cross-Petitioner here, has misread both the Second Circuit decision here and the law dealing with retroactive application of new decisions by this Court. For these reasons, the Conditional Cross-Petition must be denied.

As noted in the Cross-Petition, the Second Circuit held that the settlement in this case did not meet the requirements of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). The Court held that:

> The instant case was also settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as held in [*Union of Needletrades, Industrial and Textile Employees v. INS,* 336 F.3d 200 (2d Cir. 2003)] "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon,* she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees. (A-4).

That aspect of the Court's decision is the subject of the Petition for Certiorari in Docket No. 04-973.

The Court noted that the settlement had been accomplished before this Court had decided *Buckhannon*. Thus "in the interest of fairness," the parties should have an opportunity to renegotiate the settlement.

> In the interests of fairness, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to renegotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. Should either of the parties decline this opportunity, Ms. Rodriguez-Freytas should be given the option to either: (1) cancel the settlement agreement and proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forego the attorney's fees awarded to her by the October 15th Order. (A-5).

Cross-Petitioner seeks review of this aspect of the Second Circuit's decision.

Cross-Petitioner asserts that the opinion of the Second Circuit reported at 95 Fed. Appx. 392 (2d Cir. 2004) and contained in Petitioner's Appendix in Docket No. 04-973 is "inaccurate[]." It insists that the original decision sent to the parties by the court on April 27, 2004 was correct. (See Conditional Cross-Petition at 1). The only difference between the versions is that the first version contained an additional term: "In the interests of fairness *and pursuant to 21 U.S.C. § 2106*, we therefore remand this action. . . ." (A-5). The decision reported in the West Reporters does not contain the phrase: "*and pursuant to 21 U.S.C. § 2106.*" The Cross-Petitioner's claim is clearly wrong.

The idea that Westlaw would – out of the blue – simply omit one phrase from the court's decision is impossible to credit. It is clear that the Second Circuit must have deleted the phrase on its own sometime between the original decision and the publication in the West system. A

Court of Appeals often amends an original decision before it is officially published. The idea that this Court should review a decision of the Second Circuit in part because the published decision was "incorrect" is absurd.

With respect to the second basis for the Cross-Petition, there is no reason for the Court to review the Second Circuit decision. The Cross-Petitioner views the case as one if which the parties have settled a case, a judgment has been entered upon the settlement, and a court then opens up the settlement without meeting the requirements of Fed. R. Civ. Proc. 60(b).

But that is not what happened here. What the Court did was to acknowledge the unfairness of applying the *Buckhannon* rule to a party who relied upon the pre-*Buckhannon* law when she settled the case. The Court of Appeals explained:

> We are, however, sensitive to the fact that the settlement agreement in this case was negotiated pre-*Buckhannon,* when it would have been reasonable for Ms. Rodriguez-Freytas to believe that she was entitled to an award of attorney's fees. In the interests of fairness, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to re-negotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. (A-5).

Thus the correct legal issue is whether an appeal court may "in the interests of justice" refuse to apply a new decision retroactively to parties who relied upon the former legal rule. That issue is discussed in many cases.

Thus, in *Wedra v. LeFevre*, 988 F.2d 334, 342 (2d Cir. 1993), the Court explained:

> *Byrne* [*v. Buffalo Creek R.R. Co.*, 765 F.2d 364 (2d Cir. 1985)], stated that, although the general rule is that a court must apply the law in effect at the time it renders its decision, "in the interests of justice, courts may exclude certain cases from the retroactive application of a judicial decision." *Id.* at 366. The three factors we used in *Byrne* to determine whether to do this were: "(1) whether the judicial decision establishes a new principle of law; (2) whether retroactive operation would advance or inhibit the new ruling's effect; and (3) whether retroactive operation 'could produce substantial inequitable results.'"

Based on this rule, it is clear that the Second Circuit had the right not to give full effect to *Buckhannon* and to allow the parties to reevaluate the settlement they had arrived at in light of the new rule. There is no doubt *Buckhannon* established a new rule of law. Simply allowing the parties to reevaluate their situation in light of the new rule would not inhibit the new ruling's effect. And retroactive application of *Buckhannon* "could produce substantial inequitable results" as it did here. Thus, it was proper for the Second Circuit to allow the parties to return to their respective positions before the settlement was accomplished. There is no reason to challenge that decision here.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a writ of certiorari should be denied.

Dated: New York, N.Y.
March 23, 2005

Respectfully submitted,

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